SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000541-001 DT 01/13/2006

HON. MARGARET H. DOWNIE

CLERK OF THE COURT
L. Rasmussen
Deputy

FILED: 01/16/2006

CIGNA HEALTHCARE OF ARIZONA INC
CONNECTICUT GENERAL LIFE INSURANCE COMPANY

JEFFREY B MESSING

v.

BETSEY BAYLESS (001)
STATE OF ARIZONA (001)
UNITED HEALTHCARE (001)

BARBARA MEDWIN BEHUN
KIERSTEN A MURPHY
KATHLEEN L WIENEKE

OFFICE OF ADMINISTRATIVE HEARINGS

RULING

The court has had Cigna's request to conduct additional discovery and introduce new evidence under advisement. The defendants (collectively referred to herein as the "State") and the intervenor (United Healthcare) oppose Cigna's request. The court has considered the memoranda submitted, as well as the arguments of counsel.

Cigna seeks to discover and introduce additional evidence regarding: (1) discussions between the State and United Healthcare after May 13, 2004 that allegedly resulted in modifications to United's proposal; and (2) the State's alleged failure to consider the impact of United Healthcare's "open access" EPO until after the contract was awarded.

In the administrative proceedings, the parties presented evidence before an Administrative Law Judge ("ALJ") over the course of 13 hearing days. The ALJ precluded Cigna from questioning witnesses about post-May 13 communications between the State and United, as well as regarding the allegation that the State did not consider the effect of United's "open access" EPO until after the contract was awarded. The ALJ also denied Cigna's request for discovery relating to these issues.

The starting point in this court's analysis is A.R.S. § 12-910(A), which provides:

> An action to review a final administrative decision shall be heard and determined with convenient speed. If requested by a party to an action within thirty days after filing a complaint, **the court shall hold an evidentiary hearing**, including testimony and argument, **to the extent necessary to make the determination required by subsection E of this section**. The court may hear testimony from witnesses who testified at the administrative hearing and witnesses who were not called to testify at the administrative hearing. [emphasis added]
>
> A.R.S. § 12-910(E) states:
>
> The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

Judicial review of administrative decisions is and always has been limited. Reading A.R.S. § 12-910 as broadly as Cigna urges would dramatically alter and expand the scope of judicial review. It would essentially convert judicial review actions into *de novo* proceedings. Administrative hearings would become virtually meaningless, and the mandate of deference would ring hollow. Such an interpretation would also render A.R.S. § 12-911(A)(7)[1] without meaning. Courts do not interpret statutes to contain useless provisions unless no other construction is possible. *Tucson v. Clear Channel Outdoor*, 209 Ariz. 544, 553, 105 P.3d 1163, 1172 (2005).

In *Shaffer v. Arizona State Liquor Board*, 197 Ariz. 405, 4 P.3d 460 (App. 2000), the court noted that, while the 1996 amendments to A.R.S. § 12-910(A) have "muddied the waters" of administrative law, the judicial standard of review remains unchanged. The *Shaffer* court explained the relatively narrow application of A.R.S. § 12-910(A):

> The court, as before, defers to the administrative decision if substantial evidence supports it. If, on the other hand, the court concludes that the new or additional evidence is such that, had it been introduced in the administrative proceedings, no reasonable fact finder would have reached the administrative decision, then the latter is not supported by substantial evidence.

197 Ariz. 405, 409, 4 P.3d 460, 464.

Shaffer also holds that it is the "unusual" case that will warrant the introduction of new evidence in the superior court:

[1] A.R.S. § 12-911(A)(7) states that the Superior Court may: "When a hearing has been held by the agency, remand for the purpose of taking additional evidence when from the state of the record of the administrative agency or otherwise it appears that such action is just."

> [W]e conclude that the legislature did not intend to make the superior court an independent trier of fact and that the statute offers a safety net **for the unusual case** in which new evidence, had it been presented in the administrative proceeding, would have changed the decision. [emphasis added]

197 Ariz. 405, 409, 4 P.3d 460, 464.

In the case at bar, Cigna is attempting to introduce (and discover) evidence that the ALJ specifically disallowed. Cigna's challenges to the ALJ's rulings may be briefed and argued in this proceeding.[2] If the court were to find that the ALJ erred in precluding evidence or disallowing discovery, it would have several options, which could presumably include reversal, remand pursuant to A.R.S. § 12-911(A)(7), a finding of harmless error, or perhaps the presentation of additional evidence in this court. It is, however, putting the proverbial cart before the horse to allow additional discovery and evidence at this juncture, before the court makes the threshold inquiries clearly contemplated by A.R.S. § 12-910(E) and *Shaffer*.

IT IS ORDERED denying Cigna's request to conduct additional discovery and present new evidence. The court requests that counsel personally confer in an attempt to agree on a briefing schedule. If full agreement cannot be reached, a joint memorandum should be submitted to the court by February 10, 2006 setting forth the areas of agreement and disagreement. If an agreement is reached, a stipulation and order for the court's signature should be filed.

[2] The court declines to bifurcate the evidentiary issues and decide them in a relative vacuum at this early stage of the proceedings. To say that the record on appeal is voluminous would be an under-statement. The record will be reviewed when the parties' briefing is complete. Only at that point will the court have a sufficient factual and legal context to intelligently rule regarding the evidentiary issues.